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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/802,631	03/08/2001	David E. Babiarz	04489/91885-501	9953
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Steven J. Goldstein, Esq. FROST BROWN TODD LLC 2200 PNC Center 201 East Fifth Street Cincinnati, OH 45202-4182				
EXAMINER MADSEN, ROBERT A				
ART UNIT		PAPER NUMBER		
1761				

DATE MAILED: 11/20/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	09/802,631	BABIARZ ET AL.	
	Examiner	Art Unit	
	Robert Madsen	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3,6-9,13 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-3,6-9,13 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- | | |
|---------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) ____ | 6) <input type="checkbox"/> Other: |

DETAILED ACTION

1. The Amendment filed August 28, 2003 has been entered. Claims 1-3, 6-9, and 13 remain pending in the application.
2. In light of the amendment the rejection of claims 7 and 8 under 35 USC 102(b) as being anticipated by Lazarus (US 1566146) is hereby withdrawn.
3. The rejections made under 35 USC 103(a) stand and are included in this office action.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1, 2, 7 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reynolds in view of Constable et al. and Solomon.
6. Reynolds teaches rolling a warm sheet of fruit leather, as recited in claim 2, to form homemade fruit rolls, which have two or more layers lying in contact with one another (See Page 2). However, Reynolds is silent in teaching a tack region on the trailing end that serves as the sole point of attachment, as recited in claim 1, or a end portion attached to another portion, as recited in claim 7, formed by pressure or application of heat. Examiner is taking claim 1 to mean in a multiple layer coil only one point of attachment occurs and that point is between the trailing end and the adjacent layer.

7. However, Reynolds teaches forming a homemade fruit roll from a fruit sheet, and it is notoriously well known to have pressure formed points of attachments on any type of homemade food roll formed by a food sheet. Constable et al. are relied on as evidence of forming a homemade food roll, a cannoli, by rolling a dough sheet and pressing the end portion, the trailing end as the sole point of attachment, to seal (See Step 3, Page 81). Solomon is relied on as further evidence of the conventionality of forming a homemade food roll, an egg roll, by rolling a dough sheet pressing the end portion, which is the trailing end as the sole point of attachment, to seal (See Egg Rolls, Singapore Style, Page 38). Therefore it would have been obvious to press the end portion, or trailing end, to serve as a sole point of attachment as recited in claims 1 and 7, since Reynolds teaches forming homemade fruit roll by rolling a sheet of fruit leather and Constable et al. and Solomon teach the conventional means for attaching a end portion or trailing end of a food sheet to form a rolled food: applied pressure at the end portion or trailing end to one location on an adjacent portion. One would have been substituting one conventional means for maintaining a food sheet roll form for another.

8. Claims 3 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reynolds in view of Constable et al. and Solomon., as applied to claims 1,2,7,8, further in view of Shaffer.

9. Although Reynolds teaches adding garnishes, Reynolds is silent in teaching applying a granular coating per se. Shaffer teaches fruit leathers stick to each other during storage and can be coated with sugar to prevent sticking (Page 4—Storing Dry

Foods). Therefore, it would have been obvious to coat the exterior of the rolls with sugars since this would prevent sticking during storage.

10. Claims 6 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reynolds in view of Constable et al. and Solomon., as applied to claims 1,2,7,8, further in view of Kendall et al.

11. Although Reynolds teaches wrapping the rolled fruit sheets, Reynolds is silent in teaching packaging them in a bag. Kendall et al. are relied on as evidence of packaging a homemade rolled fruit sheet in a bag (Page 2). Therefore, it would have been obvious to package the rolled fruit sheet of Reynolds in bags since one would have been substituting one type of packaging for another for the same purpose: storing homemade rolled fruit sheets.

Response to Arguments

12. Applicant argues that examiner's assertion that "it is notoriously well known to have pressure formed points of attachment on any type of homemade food roll formed by a food sheet." Both Constable et al. and Solomon are relied on as evidence in the rejection to support the examiner's statement. Both teach homemade rolled food strips and how to maintain their rolled configuration: a tacked region about the trailing end attached by the application of pressure.

13. Applicant argues that because Constable et al. and Solomon both teach *filled* rolled food strips, that there is no suggestion to combine the references with Reynolds.

The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

14. In this case, Reynolds teaches storing a fruit strip that is rolled and wrapped tightly for storage (See Pouring the Leather and Drying the Leather on Pages 2 and 3). Thus, Reynolds teaches storing the fruit strips in a rolled configuration. Constable et al. and Solomon both teach items or articles of manufacture comprising food strips in a rolled configuration and a tacked region formed by applying pressure at the trailing end. In the case of Constable et al. this particular roll shape is maintained even after frying, and in the case of Solomon roll shape is maintained after filling. Clearly both teach by applying pressure to the trailing end of a rolled food strip, the rolled configuration may be maintained. Thus they provide motivation to include a tack region of applied pressure for Reynolds to maintain the rolled shape .

15. Furthermore, the fact that Constable et al. and Solomon include fillings is not relevant since the claims recite an item or article of manufacture "comprising" a rolled fruit strip and do not exclude a filling, and it is noted that the rolled food strip of Reynolds may also be filled (on page 3 under "Fillings to Try").

16. Applicant further argues that because Kendall et al. teach "loosely" rolling a fruit strip that providing a tacked region for the Reynolds fruit strip would not have been

obvious . Kendall et al. are not applied to the independent claim (with the tacked feature), as implied by applicant, but rather Kendall et al. are relied as evidence of using bags for packaging homemade rolled fruit strips, which is a limitation in the dependent claim. Reynolds teach homemade rolled fruit strips. Thus, regardless of how the rolled fruit is "tacked", Kendall et al. teach how to package homemade rolled fruit strips.

Conclusion

17. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

18. A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

19. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

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20. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone number for the organization where this application or proceeding is assigned is (703)872-9310.

21. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.



MILTON I. CANO
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1700

Robert Madsen 
Examiner
Art Unit 1761